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Nos. 86-939, 86-941

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

DONALD P. HODEL,
SECRETARY OF THE INTERIOR, ET AL.,
Petitioners,

v.

STATE OF MISSOURI, ET AL.,
Respondents

ENERGY TRANSPORTATION SYSTEMS, INC.,
Petitioner,

v.

STATE OF MISSOURI, ET AL.,
Respondents

BRIEF FOR THE STATES OF NORTH DAKOTA, SOUTH DAKOTA AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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The States of North Dakota, South Dakota, and Wyoming as *amici curiae* pursuant to Supreme Court Rule 36.4 urge that this Court grant the petitions for a writ of certiorari in the above-captioned cases in order to review the decision of the United States Court of Appeals for the Eighth Circuit in *Missouri v. Andrews*, 787 F.2d 270 (8th Cir. 1986).

The States of North Dakota, South Dakota, and Wyoming comprise a substantial portion of the Upper Basin of the Missouri River. The Upper Basin States have no current dispute amongst themselves about the allocation and use of water from the mainstem of the Missouri River. The Upper

Basin States do have a significant dispute with the Lower Basin States of Missouri, Nebraska, and Iowa — Respondents herein — as a result of the Respondent States' lawsuit herein and associated actions intended to deprive the Upper Basin States of their right, power and authority to use or allocate the waters of the Missouri River stored for reclamation and irrigation purposes behind mainstem dams within the territorial boundaries of the Upper Basin States.

The Eighth Circuit's ruling in *Missouri v. Andrews* placed the entire mainstem of the Missouri River under the exclusive control of the Army Corps of Engineers, deprived the Secretary of Interior of authority to devote any mainstem Missouri River water to reclamation purposes, and thus effectively denied the Upper Basin States of their right, power and authority to allocate waters wholly within their territorial boundaries. The Eighth Circuit thus grossly misconstrued the compromise reached in the Pick-Sloan Plan that Congress codified in the Flood Control Act of 1944. As the Solicitor General has recognized, if the Eighth Circuit's decision is not reversed, it will "seriously undermine the concept of shared jurisdiction that is central to the Pick-Sloan Plan, and [will] unjustifiably restrict the government's ability — and the ability of the states in which the water is stored — to dedicate to beneficial uses the vast quantities of water that have been stored in the multi-purpose reservoirs created pursuant to the Plan." *Hodel v. Missouri,* No. 86-941, *Petition For A Writ of Certiorari*, at 17.

North Dakota, South Dakota and Wyoming believe it is essential that this Court review the issues regarding the Missouri River that were presented to the Eighth Circuit in *Missouri v. Andrews.* They believe the Court should grant South Dakota's Renewed Motion For Leave To File Complaint in *South Dakota v. Nebraska,* No. 103 Original, and consolidate that case with those in issue here. Such consolidation would promote two worthy objectives: (1) the conservation of judicial resources; and (2) ensuring that the broader states' rights issue

directly implicated by the *Missouri v. Andrews* decision is fully addressed.

Therefore North Dakota, South Dakota and Wyoming urge that this Court grant the petitions for a writ of certiorari in the instant cases and further urge that the Court consolidate its consideration of these cases with the renewed original action in *South Dakota v. Nebraska,* No. 103 Original.

Respectfully submitted,

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